No. 12428

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM P. THORNTON, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

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FILED

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The United States respectfully petitions the Court for a rehearing of the decision herein, entered on August 21, 1950, in respect of the question of the rate of interest applicable under the Public Vessels Act.

The Court has affirmed without mention the action of the court below, erroneous in our view, awarding interest at the local six percent rate instead of the four percent rate which marks the limit of its jurisdiction by reason of the Suits in Admiralty Act, as supplemented and amended by the Public Vessels Act (46 U.S.C. 743, 782). The per curiam disposition of this case by reference to the Court's opinion in *Thomason v. United States* leaves unanswered this important question as to the rate of interest. It is difficult to tell whether the Court intends to go into conflict with the opinion of the Second Circuit in *Lauro* v. *United States,* 1947 A.M.C. 1475, 163 F. 2d 642, 1948 A.M.C. 1442, 168 F. 2d 714, and require henceforth that interest at the local rate be awarded, or whether it has inadvertently

overlooked the importance of the matter because of the small amount.[1]

It is respectfully submitted that for the guidance of the lower courts at least a clarification of the memorandum per curiam in this case is in order. Finally, the question is one of jurisdiction and it is therefore possible that the United States may be required to petition for certiorari in order to resolve the conflict of circuits. In that event, it will be desirable that there should be no obscurity in the record as to this Court's reasoning.

I

We believe that the Public Vessels and Suits in Admiralty Acts equally limit the jurisdiction of the district court to award interest so that it has no power to make an award in excess of four percent. This is the usual rate allowed against the Government and is the same rate which is provided by the Tucker and Tort Claims Acts (28 U. S. Code 2411, 2516). Its application is required by the policy of uniformity which this Court has found controlling in the companion case of *Thomason* v. *United States.*

With respect to the question of interest, the Public Vessels Act incorporates by reference the provision of the Suits in Admiralty Act. The Public Vessels Act provides (46 U. S. Code 782):

> Such suit shall be subject to and proceed in accordance with the provisions of Chapter 20 of this title [the Suits in Admiralty Act] or any amendment thereof, insofar as the same is not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

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[1] No question of casting the appellee in costs is involved. In admiralty it is settled that an appellant only partially successful does not recover costs. *The Anna W.,* (2d Cir., 1912) 201 Fed. 58, 62; *The Winfield S. Cahill,* (2d Cir., 1919) 258 Fed. 318, 321. Costs on appeal are discretionary with the court. *The Pendragon Castle,* (2d Cir., 1924) 1925 A.M.C. 146, 5 F. 2d 56, 58; *The St. Paul,* (2d Cir., 1921) 271 Fed. 265, 267; *The James McWilliams,* (2d Cir., 1917) 240 Fed. 951, 952.

The Suits in Admiralty Act provides (46 U. S. Code 743):

> Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States * * * may include costs of suit and, when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based.

Appellee's contract of employment made no provision for interest in the event of breach at any higher rate or at all. We believe the plain terms of the statutes therefore limit interest to four percent.

II

Until recently the four percent rate has gone unchallenged. The only case to deal with the point characterized the application of the higher six percent state interest rate as "anomalous." *Lauro* v. *United States,* (2d Cir.) 1947 A.M.C. 1476, 163 F. 2d 642, 643, further proceedings 1948 A.M.C. 1442, 168 F. 2d 714.

The ground given for the contrary holdings in recent district court cases, and which, we assume, the court below also adopted, is that the rate of interest is not one of the matters of *procedure* referred by Section 782 of the Public Vessels Act to Section 743 of the Suits in Admiralty Act, but is exclusively dealt with in Section 782, which merely forbids the allowance of interest prior to the rendition of judgment but names no rate. We believe, on the contrary, that the Congressional language and intention, to refer the rate of interest to the earlier Act, is plain and that the four percent rate is to prevail. The prohibition in Section 2 of the Public Vessels Act (46 U. S. Code 782) of interest under that Act prior to judgment leaves the four percent rate of the Suits in Admiralty Act controlling so far as concerns the rate just as surely as does the similar prohibition in section 5 of the Suits in Admiralty Act (46 U. S. Code

745) of interest under the Suits in Admiralty Act prior to the filing of the libel.[2]

Exactly the same question of the incorporation by reference in the Public Vessels Act of the Suits in Admiralty Act arose in respect of the statute of limitations. The Government's position that the Suits in Admiralty Act controls was upheld as to the limitation question in *Phalen* v. *United States,* (2d Cir.) 1929 A.M.C. 723, 32 F. 2d 687. The two years limitation of the Suits in Admiralty Act was held to bar the court from jurisdiction at any later date under the Public Vessels Act. We believe the same principle applies here. The four percent limitation of the Suits in Admiralty Act bars the court from jurisdiction to award any higher rate under the Public Vessels Act.

Finally, the interpretation we advocate accords with the general rule that interest is not awarded against the United States except in accordance with the plainest and most obvious language. *United States* v. *New York Rayon Co.,* (1947) 329 U.S. 654, 658.[3] It merely applies the traditional immunity of the sovereign from payment of interest.[4]

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[2] Cf. *United States* v. *Eastern SS. Lines,* (1st Cir.) 1949 A.M.C. 243, 171 F. 2d 589, 593-594; *National Bulk Carriers* v. *United States,* (3d Cir.) 1948 A.M.C. 735, 1563, 169 F. 2d 943, 949-951; *The Wright,* (2d Cir.) 1940 A.M.C. 735, 109 F. 2d 699, 701.

[3] See also *United States* v. *Thayer West Point Hotel Co.,* (1947) 329 U.S. 585; *Albrecht* v. *United States,* (1947) 329 U.S. 599. 605; *Boston Sand & Gravel Co.* v. *United States,* (1928) 278 U.S. 41, 47.

[4] See *United States* v. *Goltra,* (1941) 312 U.S. 203, 207; *Smyth* v. *United States,* (1937) 302 U.S. 329, 353; *United States* v. *North Carolina,* (1890) 136 U.S. 211, 216; *Angarica* v. *Bayard,* (1888) 127 U.S. 251, 260.

CONCLUSION

For the foregoing reasons, we submit that this Court should modify the decree of the court below so as to award interest at the rate of four percent instead of the six percent rate now provided by the decree of the court below.

Respectfully submitted,

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Leavenworth Colby,
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J. Charles Dennis,
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John E. Belcher,
Assistant United States Attorney.

September 1950.

I hereby certify that I have examined the foregoing petition and, in my opinion, it is well founded and entitled to the favorable consideration of the court and that it is not filed for the purpose of delay.

Leavenworth Colby.

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